LEE LIM HUAT

v.

YUSUF KHAN GHOWS KHAN & ANOR.

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL MALEK AHMAD JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: W-02-25-1997]
16 APRIL 1997

CIVIL PROCEDURE: *Injunction - Whether to be obeyed until varied or set aside - Non-compliance - Whether without more amounted to contempt of Court*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Discharge - Main suit concluded by way of consent judgment - Whether injunction automatically discharged - Whether necessary to ascertain the true intention of the parties*

CIVIL PROCEDURE: *Injunction - Whether lapsed - Application for injunction made inter-partes - Injunctive order given in absence of appellant - Effect - Whether order became an ex-parte order - Whether injunction to lapse after two weeks - Order 29 r. 1(2B) Rules of the High Court 1980 - Relevancy*

CIVIL PROCEDURE: *Contempt of Court - Breach of injunction - Argument that injunction was bad in law - Whether could justify non-compliance - Whether an entirely irrelevant consideration in contempt proceedings*

CIVIL PROCEDURE: *Contempt of Court - Breach of injunction - Sentence - Appellant an advocate and solicitor - Sentenced to one month's imprisonment - Whether excessive - Whether inadequate*

The appellant and the respondents were partners in a legal firm known as Yusuf, Lee, Pathma & Marbeck (the firm). Following misunderstandings that arose between them the appellant left the firm while the respondents stayed on and continued the legal practice. The respondents alleged that the appellant, after leaving the firm, had interfered with the affairs of the firm, and so, applied for an injunction to restrain the appellant from acting in a manner detrimental to the partnership. The application was made by a summons and was made returnable *inter-partes.* Following that, on 1 December 1995, the Court issued notice to both parties to appear on the summons on 2 December 1995. Neither

the appellant nor his Counsel appeared on the date and the Court, in the result, made an order in terms of respondents' summons. This injunctive order notwithstanding, the appellant and the respondents however entered into a consent order on 11 January 1996. By this consent order they apparently resolved their partnership problems upon certain agreed terms and conditions.

The facts showed that the appellant, while still in the partnership, had attended to a company (of which one Dato' Elli was a director) in respect of a conveyencing transaction. It was not in dispute that in respect of the transaction, a bill had been sent to the company on which some RM270,000 was still outstanding. On 27 June 1996, Dato' Elli wrote to the firm alleging that '*after due consultation with the relevant person in charge of the matter'* the amount payable on the bill was only RM58,000. When questioned by the respondents as to who the 'relevant person' was, Dato' Elli, however, refused to respond. The respondents thereupon took out a summons and successfully applied to have Dato' Elli cross-examined on oath before the Judge, and in the ensuing examination, conducted in the absence of the appellants, it came to light that the 'relevant person' referred to by Dato' Elli was none other than the appellant.

Following contempt proceedings initiated against the appellant, the learned Judge held that the appellant was guilty of contempt for having breached the terms of the injunction and in consequence sentenced him to one month's imprisonment. The appellant appealed and argued before the appellate Court that the finding of guilt was flawed as (i) there was no order capable of disobedience at the time of the alleged contempt because the injunction, granted as it were on 2 December 1995, lapsed on 16 December 1995 by virtue of O. 29 r. 1(2B) Rules of the High Court 1980 (ii) the injunction had merged into the consent judgment and had therefore ceased to exist well before the alleged breach (iii) the procedure resorted to for the taking of the evidence of Dato' Elli was unprecedented and was conducted in breach of the rules of natural justice (iv) the evidence fell short of the standard of proof required to establish the charge of contempt.

Held:

Per Gopal Sri Ram JCA

[1] Order 29 r. 1 (2B) of the RHC applies only to injunctions granted upon an *ex-parte* application. The rule does not limit the life span of an injunction granted on an *inter partes* summons or motion.

[1a] The respondents' summons seeking the injunction here was *inter partes* in nature and was served on the appellant's solicitors. The absence of the appellant or his Counsel at the hearing of the summons did not render

ex-parte the order made upon it by the Judge. Order 29 r. 1 (2B) has no relevance here and there is no merit in the argument that the injunction had lapsed by reason of this Rule of Court.

[2] A person against whom an order of Court has been issued must obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. There is thus no merit in the argument that the injunction was bad because notice that the summons would be heard on 2 December 1995 was received by the appellant on 4 December 1995. This argument is entirely irrelevant in contempt proceedings.

[3] It is not in every case that a final disposal of the action would result in an interlocutory injunction being discharged automatically and without more. Dismissal of an action apart, it depends upon the facts and the circumstances of each case whether an interlocutory injunction survives final judgment.

[3a] The parties here had entered into a consent judgment. A consent judgment is in truth an agreement reached between the parties to an action which the Court records as an order. As in the case of any other agreement, the primary function of a Court is to ascertain the true intention of the parties.

[3b] Reading the consent judgment as a whole, what the parties intended was that each side should go their separate ways. They also intended that their rights in the former partnership be determined by the taking of accounts. For the smooth working of the agreement embodied in the consent judgment, it is imperative that the appellant does not interfere with the respondents' continued running of the firm under a new name and style, and this must have been intended by the parties. The interlocutory injunction granted on 2 December 1995 ensures the smooth and effective working of the agreement reached by the parties and is therefore a necessary adjunct to the consent judgment. This being the case, the consent judgment did not have the effect of discharging the injunction.

[4] Discovery procedure could be invoked against a third party in order to ascertain the identity of the real wrongdoer. In the present case, Dato' Elli, while having knowledge of the identity referred to in his letter, was unwilling to co-operate. In the circumstances, the respondents were entitled to obtain the information from him. The respondents were well within their procedural rights to do what they did to obtain the information from Dato' Elli.

[4a] The learned Judge had offered the appellant every opportunity to cross examine Dato' Elli. Having declined the offer it does not lie in his mouth to argue as he now seeks. Any defect in procedure - and there was none here - was certainly remedied by the order for cross examination which the learned Judge was prepared to grant. The appellant, thus, had not been deprived of essential justice by the procedure adopted in securing Dato' Elli's evidence.

[5] There was no misdirection by the learned Judge on the question of proof. The judgment revealed that the Judge applied the correct test when he concluded that the appellant had intentionally breached the terms of the injunction. The evidence when considered in its totality establishes beyond reasonable doubt the guilt of the appellant on the charge of contempt.

[6] The sentence passed was not excessive and nor had the Judge erred in principle in meting out same.

Obiter dictum:

[1] Taking into account the circumstances of the case, the sentence passed was extremely lenient. Had this Court heard the matter at first instance, we would have been disposed to passing a longer term of imprisonment.

[Appeal dismisssed. Bail granted pending further appeal to Federal Court.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Injunksi - Samada hendaklah dipatuhi sehingga diubah atau diketepikan - Ketidak-patuhan - Samada dengan sendirinya membawa kepada penghinaan Mahkamah*

PROSEDUR SIVIL: *Injunksi - Injunksi Interlokutori - Pelepasan - Guaman utama diputuskan melalui penghakiman persetujuan - Samada injunksi secara otomatiknya dilepaskan - Samada perlu untuk menentukan niat sebenar pihak-pihak*

PROSEDUR SIVIL: *Injunksi - Samada luput - Permohonan untuk injunksi dibuat inter partes - Perintah injunksi diberikan kerana ketiadaan perayu - Kesan - Samada perintah menjadi perintah ex parte - Samada injunksi luput selepas dua minggu - Aturan 29 k. 1(2B) Kaedah-kaedah Mahkamah Tinggi 1980 - Kerelevanan*

PROSEDUR SIVIL: *Penghinaan Mahkamah - Kemungkiran injunksi - Hujahan bahawa injunksi adalah tidak wajar di sisi undang-undang - Samada boleh mewajarkan ketidak-patuhan - Samada merupakan pertimbangan yang tak relevan dalam prosiding penghinaan*

PROSIDING SIVIL: *Penghinaan Mahkamah - Kemungkiran injunksi - Hukuman - Perayu seorang peguambela dan peguamcara - Dijatuhkan hukuman penjara selama satu bulan - Samada keterlaluan - Samada tidak mencukupi*

Perayu dan responden-responden adalah merupakan rakan konsgi dalam sebuah firma guaman yang dikenali sebagai Yusuf, Lee, Pathman & Marbeck (firma tersebut). Berikutan perselisihan faham yang berbangkit di antara mereka, perayu telah meninggalkan firma tersebut, sementara responden-responden pula kekal di situ dan meneruskan pengamalan undang-undang mereka. Responden-responden mendakwa bahawa perayu, setelah meninggalkan firma tersebut, telah mencampuri dalam hal-ehwal firma tersebut, dan oleh yang demikian telah memohon untuk mendapatkan satu injunksi bagi menghalang perayu daripada bertindak dalam cara yang boleh menjejaskan perkongsian tersebut. Permohonan itu telah dibuat melalui saman dan dibuat untuk dikembalikan *inter partes*. Berikutan dengan itu, pada 1 Disember 1995, Mahkamah telah mengeluarkan notis kepada kedua-dua pihak untuk hadir menurut saman tersebut pada 2 Disember 1995. Perayu mahupun Peguamnya, tidak hadir pada tarikh tersebut dan Mahkamah, sebagai akibatnya, telah membuat perintah menurut saman responden. Meskipun terdapat injunksi tersebut, perayu dan responden-responden bagaimanapun telah memasuki satu perintah persetujuan pada 11 Januari 1996. Melalui perintah ini mereka kelihatannya telah menyelesaikan masaalah perkongsian mereka berdasarkan terma-terma dan syarat-syarat tertentu yang dipersetujui.

Fakta menunjukkan bahawa perayu, ketika masih dalam perkongsian, telah mengendalikan urusan sebuah syarikat (yang mana seorang yang bernama Dato' Elli adalah pengarahnya) berhubung dengan transaksi pemindahhakan. Tidak dipertikaikan bahawa sehubungan dengan transaksi itu, satu bil telah dikirimkan kepada syarikat itu di mana lebihkurang RM270,000 masih belum dijelaskan. Pada 27 Jun 1996, Dato' Elli telah menulis kepada firma tersebut mengatakan bahawa "*after due consultation with the relevant person in charge of the matter*" jumlah yang kena dibayar menurut bil tersebut adalah hanya RM58,000. Apabila disoal oleh responden-responden mengenai siapakah 'relevant person' yang dimaksudkan, Dato' Elli, walau bagaimanapun, enggan memberikan jawapan. Responden-responden telah mengeluarkan saman dan berjaya memohon supaya Dato' Elli diperiksa-balas secara bersumpah di hadapan Hakim, dan dalam pemeriksaan yang berikutnya, yang dibuat tanpa kehadiran perayu, telah diketahui bahawa 'the relevant person' yang dirujuk oleh Dato' Elli adalah tidak lain daripada perayu.

Berikutan prosiding penghinaan yang dimulakan terhadap perayu, Hakim yang bijaksana telah memutuskan bahawa perayu bersalah atas penghinaan kerana telah memungkiri terma-terma injunksi dan akibatnya telah menjatuhkan hukuman penjara selama satu bulan terhadapnya. Perayu telah merayu dan berhujah di hadapan Mahkamah rayuan bahawa keputusan bersalah terhadapnya itu tidak sempurna kerana (i) tidak terdapat perintah yang tidak dipatuhi pada waktu penghinaan yang dikatakan itu kerana injunksi berkenaan, yang diberikan pada 2 Disember 1995, telah pun luput pada 6 Disember 1995 menurut A. 29 k. 1(2B) Kaedah-kaedah Mahkamah Tinggi 1980 (ii) injunksi tersebut telah bersatu dengan penghakiman persetujuan dan dengan itu tidak lagi wujud sewaktu kemungkiran yang dikatakan itu (iii) prosedur yang digunakan bagi mendapatkan keterangan Dato' Elli adalah tidak pernah berlaku dan telah memungkiri kaedah-kaedah keadilan asasi (iv) keterangan tidak mencapai tahap bukti yang diperlukan bagi menentukan tuduhan penghinaan.

Diputuskan:

Oleh Gopal Sri Ram HMR

[1] Aturan 29 k. 1(2B) KMT terpakai hanya kepada injunksi-injunksi yang diberikan berdasarkan permohonan *ex parte*. Kaedah itu tidak menghadkan tempoh sesuatu injunksi yang telah diberikan atas saman atau usul *inter partes.*

[1a] Saman oleh responden untuk mendapatkan injunksi di sini adalah bersifat *inter partes* dan telah disampaikan kepada peguamcara perayu. Ketiadaan perayu atau Peguamnya di perbicaraan saman tidak menjadikan *ex parte* perintah yang dibuat ke atasnya oleh Hakim. Aturan 29 k. 1(2B) tidak mempunyai apa-apa perkaitan dengan kes ini, dan dengan itu tidak terdapat merit dalam penghujahan bahawa injunksi itu telah luput menurut kaedah Mahkamah ini.

[2] Orang terhadap siapa suatu perintah Mahkamah telah dikeluarkan mestilah mematuhi perintah itu sehingga ianya diketepikan. Ianya tidak terbuka baginya untuk memutuskan bagi dirinya sendiri samada perintah itu telah dikeluarkan secara salah dan dengan itu tidak perlu dipatuhi. Dengan itu tidak terdapat merit dalam penghujahan bahawa injunksi itu tidak sempurna kerana notis bahawa saman tersebut akan didengar pada 2 Disember 1995 telah diterima oleh perayu pada 4 Disember 1995. Penghujahan ini adalah tak relevan dalam prosiding penghinaan.

[3] Bukanlah dalam setiap kes bahawa pelupusan secara muktamad sesuatu tindakan itu akan membawa kepada keputusan injunksi interlokutori dilepaskan secara otomatik. Selain daripada penolakan sesuatu tindakan,

ianya bergantung pada fakta-fakta dan keadaan setiap satu kes samada sesuatu injunksi interlokutori berjaya menjangkaui penghakiman muktamad.

[3a] Pihak-pihak di sini telah memasukkan penghakiman persetujuan. Sesuatu penghakiman persetujuan adalah sebenarnya perjanjian yang dicapai antara pihak-pihak berkaitan terhadap satu tindakan yang dicatatkan oleh Mahkamah sebagai satu perintah. Sepertimana keadaannya dengan mana-mana perjanjian yang lain, fungsi utama sesebuah Mahkamah adalah untuk menentukan niat sebenar pihak-pihak tersebut.

[3b] Membaca penghakiman persetujuan di sini secara keseluruhannya, apa yang pihak-pihak tersebut niatkan adalah bahawa setiap pihak harus menurut haluan mereka masing-masing. Mereka juga berniat supaya hak mereka dalam perkongsian yang dahulu itu ditentukan dengan mengambil kira akaun-akaun. Demi perjalanan lancar perjanjian yang dimeterikan dalam penghakiman persetujuan itu, ianya adalah amat mustahak bahawa perayu tidak menggangui dalam pengendalian berterusan firma tersebut oleh responden di bawah satu nama yang baru, dan ini semestinya telah diniatkan oleh pihak-pihak tersebut. Injunksi interlokutori yang telah diberikan pada 2 Disember 1995 memastikan perjalanan lancar dan berkesan perjanjian yang telah dicapai oleh pihak-pihak tersebut dan adalah dengan itu satu tambahan yang perlu kepada penghakiman persetujuan itu. Oleh yang demikian, penghakiman persetujuan itu tidak mempunyai kesan melepaskan injunksi tersebut.

[4] Prosedur 'discovery' boleh digunakan terhadap pihak ketiga bagi memastikan identiti sebenar pembuat kesalahan. Dalam kes semasa, Dato' Elli, sementara mengetahui identiti yang dirujuk dalam suratnya, tidak bersedia untuk memberikan kerjasama. Dalam keadaan yang sedemikian, responden berhak untuk mendapatkan maklumat daripada beliau. Responden mempunyai hak prosedur melakukan apa yang telah mereka lakukan bagi mendapatkan maklumat daripada Dato' Elli.

[4a] Hakim yang bijaksana telah menawarkan setiap peluang bagi memeriksa balas Dato' Elli. Setelah menolak tawaran itu, ianya kini tidak terbuka kepada perayu untuk berhujah sepertimana yang beliau cuba lakukan di sini. Mana-mana kecacatan prosedur – dan ianya tidak terdapat di sini – sesungguhya telah diremedikan oleh perintah untuk pemeriksaan balas yang mana Hakim yang bijaksana telah bersedia untuk berikan. Perayu, dengan itu tidak dilucut hak daripada menikmati keadilan asasi melalui prosedur yang diterima-pakai dalam mendapatkan maklumat daripada Dato' Elli.

[5] Tidak terdapat salah arahan oleh Hakim yang bijaksana mengenai persoalan bukti. Penghakiman itu telah mendedahkan bahawa Hakim tersebut telah memakai ujian yang betul apabila beliau memutuskan bahawa perayu telah dengan sengaja memungkiri terma-terma injunksi. Keterangan yang wujud, apabila dipertimbangkan secara menyeluruh, menentukan tanpa sebarang keraguan kesalahan perayu atas tuduhan penghinaan.

[6] Hukuman yang dijatuhkan tidak keterlaluan dan Hakim juga telah tidak tersalah pada prinsipnya dalam menjatuhkan hukuman itu.

Obiter dictum:

[1] Mengambilkira semua keadaan, hukuman yang telah dijatuhkan adalah terlalu ringan. Sekiranya Mahkamah ini telah mendengar perkara itu pada mulanya, kami tentunya lebih cenderung untuk menjatuhkan tempoh penjara yang lebih lama.

[Rayuan ditolak. Jaminan diberikan sementara menantikan rayuan yang selanjutnya kepada Mahkamah Persekutuan.]

Cases referred to:
Wee Choo Keong v. MBf Holdings Bhd. & Anor. [1993] 2 MLJ 217 ***(foll)***
Norwich Pharmacal Co. & Ors. v. Customs and Excise Commissioners [1974] AC 133 ***(foll)***
In re Bramblevale Ltd. [1970] Ch. 128 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 29 r. 1(2B)

Other sources referred to:
Interlocutory Injunctions, Tan Woon Tiang & Koh Kok Wah, 1st Edn., p. 25
Kerr on Injunctions, 6th Edn., p. 663
Law And Practice Of Compromise, David Foskett, 4th Edn., p. 81

[Appeal from High Court Malaya, Kuala Lumpur; Civil Suit No: S5-22-205-95]

For the appellant - Christopher Fernando (Haresh Mahadevan & P. Uthayakumar with him); M/s. Aris Rizal Christopher Fernando & Co.
For the respondents - B.S. Sidhu (Cantius Leo Cameons & David Churme); M/s. Chin & Co.

JUDGMENT

Gopal Sri Ram JCA:

Introduction

This appeal arises from the decision of the High Court finding the appellant guilty of contempt for the breach of an injunction and sentencing him to one month's imprisonment. On 31 January 1997 this Court granted the appellant bail pending appeal in the sum of RM200,000 in two sureties and ordered him to surrender his international and restricted passports. Since this matter involved the liberty of a citizen, we directed an early hearing of the appeal.

Facts and Background

The appellant is a member of the legal profession. So are the respondents. All of them were at one point in time members of the Judicial and Legal Service. They resigned and had themselves admitted to the Bar. They came together and formed a firm in which they practised as advocates and solicitors. Initially they enjoyed an amicable relationship. Later it turned sour. In the end they decided to part company. The appellant left the firm. The respondents decided to stay on together and practise law. The separation of these former friends was bitter and acrimonious. They hurled allegations against each other. It culminated in a suit being filed by the respondents against the appellant. One of the complaints made by the respondents was that the appellant continued to interfere with the affairs of the new firm. The respondents therefore applied for an injunction. The application was made by a summons taken out on 4 August 1995. It was made returnable *inter partes* on 1 September 1995. The relief sought included an order seeking to restrain the appellant acting in a manner detrimental to the partnership.

When the respondents' summons came on for hearing before the learned Judge on 1 September 1995, he indicated that the interests of the parties would be best served by an early trial of the action. This the learned Judge was well entitled to do. The summons was accordingly adjourned pending the disposal of the suit.

Matters must, however, have come to a head because in early December 1995 the respondents took steps to restore their summons for urgent hearing. On 1 December 1995 the Court issued notice to both parties to appear on the summons the very next day. On 2 December, when the summons came on for hearing, Counsel for the respondents was present. However, neither the appellant nor his Counsel appeared. The reason for their absence is a matter which we will advert to when we come to deal with the arguments advanced

by the appellant before us. Suffice to say that it was in these circumstances that the learned Judge made an order in terms of the respondents' summons.

On 11 January 1996 the parties entered into a consent order which contains the following terms:

1) The defendant's partnership with the plaintiffs ceased as of 31 July 1995 and the firm shall be continued by the 1st and 2nd plaintiffs as of that date.

2) The defendant's name shall be removed from the firm's name of Yusuf Lee Pathma & Marbeck within 3 months from the date of this Order.

3) That Bala Subramaniam s/o Karrupiah of S.M. Loh & Bala, Certified Public Accountants be hereby appointed the accountant to enquire, inspect and determine the assets, liabilities, dealings, transactions and the value of all files as at 31 July 1995 and thereafter ascertain the defendant's and plaintiffs' entitlement in respect thereof and for such purposes:

   (a) the defendant shall hand to the firm through the accountant within 14 days from the date hereof all the properties and assets of the firm including a list of files in his custody.

   (b) the plaintiffs shall enable the accountant access to all the files and documents that are now in their custody.

   (c) the accountant shall complete the accounts within six months from the date of this Order.

4) That upon ascertainment of their respective entitlement each party shall settle the amounts due to the other as the case may be within three (3) months from the delivery of the accounts to all the parties subject always to para. 7 hereof.

5) The remuneration and costs of the accountant shall be paid from the assets of the partnership as of 31 July 1995 and shall have priority over all other payments.

6) The defendant shall with notice of appointment be entitled to access to the premises of the firm to enable him to remove his personal belongings, effects and files.

7) The parties hereto and the said accountant shall be at liberty to apply.

8) That the defendant's counterclaim be struck off.

9) That there be no order as to costs.

On 28 November 1996, the respondents obtained leave to commit the appellant for alleged breach of the injunction. They then filed their substantive motion. The facts on which respondents' application was based arose in this way.

The appellant, while still in the partnership with the respondents, had attended to a company (of which one Dato' Elli bin Hj. Mohd. Tahir was a director) in respect of a conveyancing transaction. A bill had been sent by the firm to Dato' Elli's company which made part payment. The balance outstanding on the bill was almost RM270,000.

On 27 June 1996, the company wrote a letter to the respondents. It was signed by Dato' Elli. It alleged that "after due consultation with the relevant person in charge of the … matter" the amount payable to the respondents was only RM58,000. The appellants wanted to discover the identity of the "relevant person" referred to by Dato' Elli. They wrote to him asking for particulars. But there was no response from Dato' Elli. So, they took out a summons to have Dato' Elli cross-examined on oath before the Judge. The Judge granted the order. Dato' Elli was then produced before the Judge on 15 November 1996 and questioned by the respondents' Counsel. He admitted that the person referred to in the letter was the appellant. The relevant portion of his *viva voce* examination reads as follows:

> The relevant person is Mr. Lee Lim Huat. Encik Lee Lim Huat called me sometime in April 1996 and told me that the figure was not correct. ... He gave no reason why this amount was different from the original bill. I did not ask the reasons. I know that I have to pay to this firm of Messrs. Yusuf Khan & Pathmanathan. At that time I heard that Mr. Lee Lim Huat had left the firm of Yusuf Khan & Pathmanathan. I never queried the original bill.

Now, the *viva voce* examination of Dato' Elli was conducted in the absence of the appellant. The appellant was dissatisfied with the procedure adopted. He complained about it before the learned Judge at the hearing of the substantive motion for committal. He made it a ground of appeal before us. We will deal with his complaint later in this judgment.

It was only after Dato' Elli's examination that the respondents initiated contempt proceedings. They applied for a certified copy of the note of Dato' Elli's evidence recorded by the Judge. They served it on the appellant together with the other cause papers. The appellant filed an affidavit in answer to the charge against him. However, he did not choose to give oral evidence. Neither did he apply to have Dato' Elli produced for further cross-examination. The Judge offered him that opportunity. But he declined the offer.

After hearing arguments the learned Judge found the appellant guilty of contempt for having breached the terms of the injunction. He sentenced the appellant to serve a month in prison. The appellant appealed against these findings.

The appeal came before us for hearing on 17 February 1997. However, upon application made by Counsel for the appellant it was adjourned to 21 March 1997. It was heard on that date and adjourned for continued hearing on 3 April 1997. At the conclusion of arguments we dismissed the appeal and affirmed the sentence passed by the High Court. However, we made an order extending the bail already granted upon the same terms until the hearing and disposal of the application for leave to appeal which the appellant proposes to make to the Federal Court.

The Submissions of Counsel

In support of the appeal, Encik Fernando of Counsel for the appellant submitted that his client ought not to have been found guilty of contempt because:

(1) the injunction in question had lapsed before the alleged act of contempt, and so there was no order capable of disobedience;

(2) the injunction had merged into the consent judgment that had been entered into by the parties and had therefore ceased to exist well before the alleged breach;

(3) the contempt proceedings were fundamentally flawed because there had been a breach of the rules of natural justice in that Dato' Elli's evidence had been taken *ex parte* the appellant and then relied upon to found the conviction.

(4) the evidence led by the respondents fell short of the standard of proof required to establish the charge of contempt. On the other hand, the learned Judge reversed the burden by presuming that the appellant was guilty of contempt.

We will now deal with each of these arguments in turn.

Lapse of Injunction

The submissions advanced by Counsel in support of the first ground may be summarised as follows.

The injunction, the breach of which was alleged, was granted *ex parte*. Accordingly, by reason of the provisions of O. 29 r. 1(2B) of the Rules of the High Court, 1980, it lapsed at the end of two weeks from the date of its

grant. In other words, the injunction granted on 2 December 1995 lapsed on 16 December 1995. The alleged breach occurred in April 1996. There was no injunction in force at that time. Consequently, there was no contempt.

Order 29 r. 1(2B) which is the fulcrum upon which the submissions of Counsel turn reads as follows:

> (2B) Unless sooner revoked or set aside, an interim injunction obtained on an *ex parte* application shall automatically lapse at the end of two weeks from the date on which it is granted.

The language in which the Rule has been cast makes it plain that it applies only to injunctions granted upon an *ex parte* application. The Rule does not limit the life span of an injunction granted on an *inter partes* summons or motion. Such an injunction will usually continue to remain in force until further order or until the disposal of the action in which it was obtained.

Thus, in order to resolve the issue raised by Counsel before this Court, it is necessary first to determine the nature of the application upon which the respondents obtained their injunction in this case. If it was an *ex parte* application, then, the appellant would be quite right in his contention. If, on the other hand, it was an *inter partes* application, then, r. 1(2B) would have no relevance and the submission made to us would lack merit.

As earlier observed, the respondents' summons taken out on 4 August 1995 seeking the injunction was *inter partes* in nature. It was not headed as an *ex parte* summons. It was served on the appellant's solicitors. The absence of the appellant or his Counsel at the hearing of the summons on 2 December 1995 did not render *ex parte* the order made upon it by the Judge. Order 29 r. 1(2B) has, therefore, no relevance to the present case. Hence, the argument of Counsel that the injunction had lapsed by reason of this Rule of Court has no merit whatsoever.

Counsel for the appellant also contended that the injunction was bad because notice that the summons would be heard on 2 December 1995 was not received by his solicitors until 4 December 1995. However, the correspondence set out in the record of appeal provided to us does not appear to support Counsel's argument. The notice of hearing issued by the High Court is addressed to the solicitors on either side at their respective Bar Council Boxes, which is the usual method by which notice is given to parties. If, as is the case, the respondents' solicitors received the notice and were able to present themselves, it is reasonable to expect the same of the appellant's solicitors.

In any event, the argument, while it may be germane in proceedings brought to set aside the injunction of 2 December 1995, is an entirely irrelevant

consideration in contempt proceedings. The point is quite unarguable in that it is concluded by binding authority against the appellant. We refer, of course, to the decision of the Supreme Court in *Wee Choo Keong v. MBf Holdings Bhd. & Anor*. [1993] 2 MLJ 217, 220, where Abdul Hamid Omar, LP said:

> It is established law that a person against whom an order of Court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of Court runs the risk of being held in contempt with all its attendant consequences.

There is, accordingly, no merit in the first argument advanced by the appellant in support of his appeal.

Discharge of the Injunction

In support of his second argument, Counsel for the appellant relied upon the following passage at p. 25 of the first edition of the work entitled *"Interlocutory Injunctions"* by Tan Woon Tiang and Koh Kok Wah which sets out **some** of the circumstances in which an interlocutory injunction may be discharged:

> An interlocutory injunction may also be discharged if the plaintiff fails to prosecute the substantive action diligently after obtaining the injunction (see *Bank Bumiputra Malaysia Bhd. v. Lorrain Esme Osman* [1990] 3 MLJ 481; *Greek City Ltd. v. Demetriou* [1983] 2 All ER 921; *Town and County Building Society v. Daisystar* [1989] 139 New LJ 1563). An interlocutory injunction will be automatically discharged if the substantive action is discontinued as an interlocutory injunction is not a separate cause of action by itself. **An interlocutory injunction is similarly discharged once judgment is given in the substantive action after the trial and no permanent injunction is granted**. If the defendant makes payment into Court in full satisfaction of the plaintiff's claim, the interlocutory injunction is discharged if the plaintiff accepts the payment into Court (see *Hargreaves Construction (Lineside) Ltd. v. Williams* [1982] The Times, 3 July). (Emphasis added.)

Counsel then referred us to the consent judgment entered on 11 January 1996. He drew attention to the absence of a permanent injunction therein. He submitted that by reason of the suit having been concluded by the consent judgment, no permanent injunction having been agreed to, the interlocutory injunction granted on 2 December 1995 had been discharged with effect from the date of the consent judgment. Therefore, when the alleged breach of it occurred, the injunction was not extant.

With respect, we found ourselves unable to agree with these submissions. In our judgment, the proposition stated by the learned authors of the work on *"Interlocutory Injunctions"* to which we have lent emphasis in the passage quoted a moment ago, apart from being unsupported by authority, goes too far. The true principle is that which appears in the 6th edition of *Kerr on Injunctions* at p. 663 and reads as follows:

> If the action is dismissed the injunction is *ipso facto* discharged. A motion or order for its dissolution is not necessary. But the dismissal of the action does not prevent the plaintiff from bringing another for the same purpose under a different state of circumstances, or upon new facts.

Thus, it is not every case in which a final disposal of the action that would result in an interlocutory injunction being discharged automatically and without more. Dismissal of an action apart, it depends upon the facts and circumstances of each case whether an interlocutory injunction survives final judgment.

In the present instance, we are not dealing with a judgment of the Court pronounced on merits. Here, the parties entered into a consent judgment. A consent judgment is in truth an agreement reached between the parties to an action which the Court records as an order. As in the case of any other agreement, the primary function of a Court is to ascertain the true intention of the parties.

When read as a whole, what the parties to the present litigation intended was that each side should go their separate ways. Paragraphs 1, 2 and 6 are clearly indicative of such an intention. The parties also intended that their rights in the former partnership be determined by the taking of accounts. It is necessary; indeed imperative; for the smooth working of the agreement embodied in the consent judgment that the appellant does not interfere with the respondents' continued running of the firm under a new name and style. And the parties must have so intended. The interlocutory injunction granted on 2 December 1995 ensures the smooth and effective working of the agreement reached by the parties and is therefore a necessary adjunct to the consent judgment.

That the approach we have adopted does not depart from settled jurisprudence is evidenced by the following passage appearing at p. 81 of the 4th Edition of *Law And Practice Of Compromise* by David Foskett:

> In addition to problems caused by imprecise drafting, parties may omit to include in their agreement a term which is necessary to render it effectual or complete. In these circumstances the Court will be prepared to imply such term or terms as may be necessary to render the agreement effective or complete in the manner in which the parties are presumed to have intended. The Court cannot, however, re-write the parties' agreement, a principle sometimes overlooked by those contending for the existence of an implied term.

For these reasons, we are of the view that the consent judgment did not have the effect of discharging the injunction. We therefore reject the second argument advanced by Counsel in support of the appeal.

Deprivation of Essential Justice

The appellant's third argument relates to the way in which Dato' Elli's evidence was obtained. His complaint is twofold. First, he says that the procedure resorted to is non-existent. Second, he says that he ought to have been given notice of the summons under which Dato' Elli was brought before the Court and his evidence recorded. He would then have had the opportunity to cross examine Dato' Elli. The appellants however deprived him of this. We will take each of these in turn.

First, the complaint about the procedure adopted. In *Norwich Pharmacal Co. & Ors. v. Customs and Excise Commissioners* [1974] AC 133, the House of Lords held that the discovery procedure could be invoked against a third party in order to ascertain the identity of the real wrongdoer. Lord Reid in his speech (at p. 175) described as very reasonable the principle:

> that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.
>
> I am the more inclined to reach this result because it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability.

So here. Dato' Elli had knowledge of the identity of the person referred to in his letter. The respondents wished to discover this fact. But Dato' Elli was unwilling to co-operate. He refused to answer the respondents' letters. The respondents were entitled to obtain the information from him. We therefore agree with Encik Sidhu of Counsel for the respondents that his clients were well within their procedural rights to do as they did. Accordingly, we are satisfied that there is no merit in the first complaint.

As far as the second complaint is concerned, our attention was drawn by Counsel for the respondents to that part of the learned Judge's judgment which reads as follows:

> The defendant at the time when he filed the affidavit knew of the evidence given in Court by Dato' Elli. He had the golden opportunity of applying to the Court to examine Dato' Elli in Court. For some reason he did not make use of that opportunity despite a reminder by the Court that he could do so.

It is thus clear that the learned Judge offered the appellant every opportunity to cross-examine Dato' Elli. Having declined the offer it does not lie in his mouth to argue as he now seeks to do. Any defect in procedure – and we hasten to add that there was none – was certainly remedied by the order for further cross examination which the learned Judge was prepared to grant. It is abundantly clear that the appellant had not been deprived of essential justice by the procedure adopted in securing Dato' Elli's evidence. In our judgment there is no merit in the third argument advanced by the appellant.

Case Not Made Out

Encik Fernando submitted that the learned Judge ought to have held that the respondents had not made out a case against the appellant. It was also submitted that the Judge had fallen into error in presuming the appellant's guilt, thereby reversing the burden of proof. Counsel referred us to the judgment of Lord Denning MR in *In re Bramblevale Ltd.* [1970] Ch. 128. The Master of the Rolls there said (at p. 137):

> A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.

Having carefully scrutinised the judgment of the learned Judge, we are of the view that there was no misdirection on his part on the question of proof. The passage in the judgment relied upon by Counsel to show that there had been a reversal of the burden appears in the context of punishment and not in reference to the proof of guilt. In fact it appears after the passage in which the learned Judge expressed satisfaction with the appellant's guilt. The judgment reveals that the Judge applied the correct test when he concluded that the appellant had intentionally breached the terms of the injunction.

It must be said in fairness to the learned Judge that he carried out a careful examination of the evidence before him. We are entirely satisfied with his appreciation of the evidence and with the inferences he drew therefrom. The

evidence when considered in its totality establishes, beyond a reasonable doubt, the guilt of the appellant on the charge of the contempt in question. We therefore reject the fourth argument raised by Counsel in support of the appeal.

Sentence

It was argued by Counsel that the sentence of imprisonment imposed by the learned Judge was excessive in the circumstances of the case. Our attention was drawn to the fact that the appellant had been convicted of another breach that had occurred latter in point of time to the breach which is the subject matter of the present appeal. In respect of that latter breach he had merely been fined. The appellant ought not, it was argued, to receive a more severe punishment for an earlier breach.

We are mindful of these and other matters raised by Counsel in support of the appeal against sentence. We have also given careful consideration to the authorities cited by him upon this part of the case. However, it is axiomatic that when it comes to sentence, subject to questions of policy, each case must be dealt with according to its own facts. It is therefore quite idle to suggest that because a defendant in another case received a lighter punishment, the appellant before us should also receive a like sentence. The principle that one set of facts are not precedent for another applies with equal force in matters of punishment.

We are here not dealing with the case of a layman accused of breaching an injunction. The appellant is a member of the Bar. As such he, more than anyone else, should respect and obey an injunction issued by the Court. The dignity of the judicial arm of Government will surely be eroded if orders of a Court are honoured more in their breach than observance by members of the Bar. The sentence passed should, apart from reflecting the gravity of the particular offence, act as a deterrent to would be violators of injunctions. We therefore reject the argument that this was an earlier offence as being entirely irrelevant.

The learned Judge when considering the punishment to be imposed took into account all relevant circumstances. It has not been demonstrated that he erred either in principle or that he had passed a sentence that was manifestly excessive. On the other hand, taking into account all the circumstances of the case, we find the sentence to be extremely lenient. Had we heard the matter at first instance we would have been disposed to passing a longer term of imprisonment.

Conclusion

For the reasons given, we came to the conclusion that the appeal had no merit and dismissed it. The orders made by the High Court were affirmed. The appellant was ordered to pay to the respondents the taxed costs of this appeal. The security paid by him into Court was ordered to be paid out to account of taxed costs.

Reported by WA Sharif